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No. 10-901

Supreme Court, U.S.
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In The

Supreme Court Of The United States

CLAUDIA SEGER-THOMSCHITZ,
Petitioner

v.

MUSEUM OF FINE ARTS, BOSTON,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR REHEARING ON ORDER OF MARCH 7, 2011 DENYING PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION AND SUMMARY OF PETITIONER'S POSITION

The attached letter from the U.S. Department of State (Department) to Petitioner's counsel dated March 8, 2011 (Letter) (appended as Exhibit 1 to his accompanying Declaration) relates an extensive colloquy between Petitioner and the Department as well as the Office of the Solicitor General (Office) of the United States concerning the issues that this case raises, and the interest of U.S. Deputy Solicitor General Edwin S. Kneedler in them. The Letter states that the Department will make known its views in the related *Von Saher v. Norton Simon Art Museum at Pasadena* No. 09-1254 (April 14, 2010), which similarly addresses the relationship under the Supremacy Clause between federal foreign policy to resolve claims for Nazi-era artworks on their substantive merits and state statutes of limitation that either preclude or restrict this objective. The Letter relates that the Department's views in *Von Saher* may bear upon this case.

Because Petitioner can develop an essential argument pertaining to conflict preemption in *Von Saher* that both petitioner and respondent have incentives to disclaim—but which the Court necessarily must consider if it entertains *Von Saher*—the Court should vacate its denial of certiorari in this proceeding, invite the Office to make known its views here as it did in *Von Saher*, and hear *Von Saher* and this proceeding together. The important questions of federal law that this case raises and which the Court should settle—which necessarily complement the parties' arguments in *Von Saher*—further recommend this request.

II. STATEMENT OF FACTS

On March 15, 2011 counsel for Petitioner received the Letter from Attorney-Adviser Brian Israel at the Department responding to an extensive colloquy that Petitioner had conducted about this case both with Mr. Kneedler and the Department. The Letter expressed regret that the Department had delayed in responding to Petitioner's request that the Department and Office file amicus briefs in support of her petitions for writs of certiorari in this proceeding and in the related *Dunbar v. Seger-Thomschitz*, No. 10-839 (Jan. 19, 2011). The Letter acknowledged that the Department had reviewed Petitioner's comprehensive memorandum (Memorandum) asking both the Department and Office to file such briefs. But the Department said that consistent with standard practice, it did not recommend that the Office do so because the United States was not a party and the Court had not invited the Office's views.

The Letter, however, stated that the Office would make known its views in *Von Saher* which the Letter identified as similarly ***"involving Holocaust era art restitution that is also before the Court on a petition for certiorari."*** (Emphasis and italics supplied.) The Letter related that ***"[t]hese views, when they are submitted, may be of interest to you."*** (Emphasis and italics supplied).

The Declaration elaborates the background of Petitioner's colloquy. Briefly, on October 13, 2010 Petitioner sent Mr. Kneedler an eight-page letter discussing how *Dunbar* and *MFA* sabotaged the clear and proactive foreign policy of both Congress and the President to resolve judicial claims for the recovery of Nazi-era artworks on their substantive

merits, and misapplied controlling Court cases, including especially *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) (Declaration at par. 3). **Petitioner addressed this correspondence specifically to Mr. Kneedler because he had argued the prevailing position of the United States in *Garamendi*.** *Id.*

On or about November 11, 2010 Petitioner sent a second letter to Mr. Kneedler with an accompanying memorandum (Memorandum) of ***nearly 56 pages*** marshalling the long history of U.S. foreign policy—which ***both*** Congress and the Executive Branch have developed—to return Nazi-era artworks to rightful owners and to ensure that claims for the recovery of these materials are decided in an equitable, just and fair manner and are not barred by statutes of limitations (Declaration at pars. 5-8). The Memorandum parsed the Court's controlling decisions which make clear the President enjoys a special authority to settle claims internationally without the approval of Congress, but since Congress had expressly validated the President's discrete claims settlement policy concerning the return of Nazi-era artworks, this policy—as expressed in, ***but not confined by***, the Terezin Declaration of June 30, 2009—enjoyed the full preemptive weight of both political branches responsible for foreign affairs. The Memorandum related that the Executive Branch viewed the Declaration—although legally non-binding and so creating no reciprocally enforceable legal obligations upon the stakeholders—as nonetheless ***important in promoting its international diplomacy*** to accomplish its prescribed goal of having all affected nations resolve claims for the recovery of Nazi-era artworks on their merits. On or about this

same date Petitioner sent the Memorandum to the Department (Declaration at Par. 5).

On December 30, 2010 Mr. Kneedler sent Petitioner an email relating that he had reviewed the Memorandum, and requesting a copy of her petition for certiorari in *Dunbar* (Exhibit 3). Mr. Kneedler said:

> Thank you for the materials you sent, which I did review. Have you filed a certiorari petition? If so, could you please email it to me?

Petitioner complied with this request and later also sent Mr. Kneedler her petition for certiorari in this case. Petitioner did not hear back from the Office and the Court denied her petition in *Dunbar* on February 22, 2011, and in *MFA* on March 7, 2011.

On March 8, 2011 Petitioner emailed Mr. Kneedler and his colleague Michael Dreeben relating that by declining to entertain *MFA* and *Dunbar*, the Court had thwarted U.S. foreign policy concerning how claims for the recovery of Nazi-era artworks should be resolved, and had ***"nailed shut the coffin on Holocaust art restitution"*** everywhere in the U.S. with the possible exception of California and New York (Emphasis and italics original) (Exhibit 4). The email invited any recommendations or suggestions.

On March 15, 2011 Petitioner received the Letter from Mr. Israel (Declaration at par. 14). The Letter closed by offering that "***I hope that this reply is of some assistance to you***." (Emphasis and italics supplied.)

III. ARGUMENT

A. That the Letter Signals an Interest in the Issues that this Proceeding Raises and the Intention of the Office to File an Amicus Brief in *Von Saher* Recommends that the Court Vacate its Denial of Certiorari and Similarly Invite the Office to Make Known its Views

The Letter and related colloquy constitute "intervening circumstances of a substantial or controlling effect" or "other substantial grounds not previously presented" within the meaning of Sup. Ct. R. 44.2. These considerations recommend that the Court vacate its order of March 7, 2011 denying the petition for writ of certiorari and invite the Office of the Solicitor General to make known its views.

The foregoing establishes the following new facts and reasonable inferences that the Court did not consider when it denied the petition:

1. Mr. Kneedler—who argued the successful position of the U.S. in *Garamendi*—believes that this case is sufficiently important to have reviewed ***more than 60 pages of memoranda*** discussing how Congress and the President developed U.S. foreign policy seeking to return Nazi-era artworks to rightful owners, and the necessary controlling preemptive effect of this policy under the Court's relevant decisions (Declaration at pars. 3, 5). After reviewing these materials Mr. Kneedler had ***continuing sufficient interest*** in the relevant issues and in Petitioner's arguments to request a copy of her petition for certiorari in *Dunbar* (Exhibit 3; Declaration at par. 10). Petitioner supplied Mr. Kneedler with

copies of her petitions both in *Dunbar* and in this proceeding (Declaration at par. 11).

2. The State Department also reviewed Petitioner's Memorandum. (Exhibit 1-Letter; Declaration at pars. 5, 14).

3. The Department did not recommend that the Office file an amicus brief because its standard practice is not to do so at the certiorari petition stage unless the U.S. was a party or the Court so invites the Office (Exhibit 1-Letter; Declaration at par. 14).

4. The Department, however, does intend to make known its views in *Von Saher* and regards *Von Saher* as raising questions closely related to those at issue here and in *Dunbar,* as it identifies *Von Saher* as also "involving Holocaust era art restitution" (Exhibit 1-Letter). Moreover, the Department strongly intimates that its views in *Von Saher* are relevant here and in *Dunbar*: ***"[t]hese views, when submitted, may be of interest to you"*** (Emphasis and italics supplied) (Exhibit 1-Letter; Declaration at par. 15).

5. The Department most likely offered the Letter to Petitioner (dated March 8 but postmarked March 14) in response to Petitioner's email of March 8, 2011 to Messrs. Kneedler and Dreeben advising that by declining to review *Dunbar* and *MFA* the Court ***"has nailed shut the coffin on Holocaust art restitution in U.S. courts,"*** that Petitioner could not reasonably envision either claimants or their counsel "tilting at this windmill any further," and inviting any recommendations or suggestions (Emphasis and italics original) (Exhibit 4); Declaration at pars. 13-14).

6. By providing Petitioner the Letter in a most timely and responsive manner, the Office and Department are willing to let the Court know that

they believe that this case is worthwhile, that the Office would make known its views in this proceeding and in *Dunbar* if the Court so requested, and that the views of the Office in *Von Saher* also pertain to this proceeding and to *Dunbar*. In this regard the Letter states ***"I hope this reply is of some assistance to you"*** (Emphasis and italics supplied) (Exhibit 1-Letter; Declaration at par. 15).

Petitioner respectfully submits that these circumstances recommend that the Court vacate its denial of certiorari in this proceeding and in *Dunbar* and invite the Office to make known its views in both cases. The Petition shows that this case has "sweeping significance" for both the foreign affairs preemption doctrine as well as for the clearly defined and vigorously pursued foreign policy of both political branches to resolve claims for the recovery of Nazi-era artworks on their substantive merits. Petition at 18-19. The Letter does not disagree.

Moreover, no harm would result were the Court to vacate its denial of certiorari and invite the Office to submit its views.

B. Because Both this Proceeding and *Von Saher* Address "Complementary" Aspects of The Foreign Affairs Preemption Doctrine Within the Meaning of *American Insurance Association v. Garamendi*, 539 U.S. 396, 420 n.11 (2003) which the Court Necessarily Must Consider in Addressing the Preemption Questions Raised in *Von Saher*—and Petitioner is Uniquely Positioned to Develop an Essential Alternative Preemption Contingency Under the Doctrine of Conflict Preemption that All of the Parties in *Von Saher* Have Incentives to Ignore—The Court Should Consolidate the Two Proceedings and Hear Them Together

Not only does this case present important questions that deserve the Court's reconsideration, these questions necessarily are integrally related to the issues in *Von Saher*. The parties in *Von Saher* have framed for the Court's consideration the question whether a California statue of limitations (Cal. Civ. Proc. § 354.3) extending until 2010 the time for Holocaust victims and their heirs to invoke judicial remedies seeking to recover Nazi-era artworks against California museums is preempted under the "field preemption" doctrine of foreign affairs preemption as the respondent museum maintains,[1] or whether this statute is consonant with—and implements—express federal policy to return Nazi-era artworks to rightful owners as petitioner and *amici* argue.[2]

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[1]Brief in Opposition at 15-18.

[2]Petition for a Writ of Certiorari at 10, 15, 23.

Petitioner is uniquely positioned to advocate a third possibility that the Court inevitably must consider if it entertains *Von Saher*—but which both parties in *Von Saher* need to disavow. This is that the foreign policy of both Congress and the Executive Branch that claims for the recovery of Nazi-era artworks be resolved equitably, in a "just and fair" manner and based upon their substantive merits and ***without regard*** to otherwise applicable statutes of limitations—***when fully developed against the backdrop of the Court's relevant decisions***—may preclude the several states from enacting ***any*** statutes of limitation that ***restrict*** the right of Holocaust victims and their heirs to reclaim Nazi-era artworks. Statutes such as § 354.3 may extend judicial remedies to recover Nazi-era artworks for a limited time ***at the whim of a particular state.*** But these statutes nonetheless may conflict irreconcilably with the overriding federal foreign policy of both political branches that claims to recover Nazi-era artworks should be decided based upon principles of equity and without regard to statutes of limitation ***whatsoever.*** This contingency represents the proverbial "800-pound gorilla" that now lurks silently and furtively in the background of all the parties' arguments both favoring and opposing certiorari in *Von Saher*. But this contingency inevitably will advance to the forefront should the Court ascertain concretely the scope and extent of established federal foreign policy in this area—as it must—if it addresses the several preemption arguments in *Von Saher*.

C. *MFA* Raises Important Questions of Federal Law that the Court Should Settle Within the Meaning of Sup. Ct. R. 10(c) That Also Are Integral to the Court's Consideration of the Foreign Affairs Preemption Issues in *Von Saher*: the Relationship Between Expressly Stated Presidential Policy to Resolve Claims for the Recovery of Holocaust-Era Artworks on Their Substantive Merits and Without Regard to Statutes of Limitation—as Prescribed In, *But Not Defined By*, the Terezin Declaration—and State Statutes of Limitations that Either *Limit* or *Foreclose* this Objective

MFA raises important questions of federal law that the Court should settle which *Von Saher* also implicates:

1. *MFA's failure to give appropriate controlling legal effect to the* ***President's extensive diplomacy*** *to resolve claims for the recovery of Nazi-era artworks on their substantive merits presents an important and unresolved question of federal law that the Court should settle.* The Courts' decisions collectively make clear that when the President seeks to resolve through diplomacy claims emanating from war—and Congress not only has impliedly approved the President's claims settlement authority in general but also has expressly validated the President's **specific claims settlement goal**, both as expressed in an executive agreement and as related

by high ranking Executive Branch officials[3]—the Federal Supremacy Clause preempts state laws that interfere or obstruct the President's diplomatic objectives. But *MFA* ignores all of this and the clear federal policy to resolve claims for the recovery of Holocaust-era artworks on their merits. It says that "there is no comparably express federal policy bearing on the issues in this case. Second, even if there were such a policy, the Massachusetts statute of limitation (three years) would not be in clear conflict with it." 623 F.3d. at 12.

2. *The strength of U.S. foreign policy to restitute Nazi-era artworks vastly exceeds—under the "sliding scale" test of foreign affairs conflict preemption intimated in Garamendi (539 U.S. at 420 n.11)—the importance of comparative state interests.* For the disputed Painting came into Massachusetts in 1972 ***already impressed*** with a ***special character and identity*** as "war booty" under international law and U.S. foreign policy, and so subject to a corresponding obligation of restitution about which the U.S. Government warned U.S. museums in 1946. Massachusetts cannot now defeat U.S. foreign policy to return the Painting merely because the Painting has been there for a period equivalent to its relevant prescriptive period (3 years).

3. *By neglecting to give the expressly stated claims settlement preference of both the President and Congress the preemptive legal effect that the Court's decisions require, MFA undermines the reasonable reliance of both political branches that the federal courts would give their express foreign policy*

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[3]*Garamendi* confirms that in areas where the President enjoys Constitutional authority to act unilaterally, statements of high ranking executive officials explicating the presidential policy are entitled to "conclusive weight." 539 U.S. at 423. n.14.

preemptive effect over conflicting state law. See Crosby v. National Foreign Trade Council, 530 U.S. 363, 387-88 (2000), "[a] failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply." In this regard Ambassador Eizenstat testified before the Helsinki Commission in May 2010 (nearly one year **after** the Terezin Declaration) that the ***Department always has assumed that courts would decide claims for the recovery of higher value artworks***: "most experts believe that claims for high value artworks will inevitably go to the court system, since the value of the artwork would justify the expense of judicial proceedings, whereas lesser value artworks would not." (Declaration at par. 9, App. at A-36.) ***But how can U.S. courts decide such claims if state limitation periods bar them?*** The views of the Office may be most helpful in this regard.

4. *Petitioner's request that the Court implement—through federal common law—the foreign policy of both Congress and the President that claims for the recovery of Nazi-era artworks be resolved equitably and on their merits does not ask the Court to make a single substantive foreign policy or legislative judgment.* Rather, Petitioner merely asks the Court to give appropriate legal effect—in a manner fully consonant with the Court's cases—to the explicitly stated foreign policy preferences of both political branches.

5. *The important questions that MFA and Dunbar raise will not "percolate" in the lower courts, so the Court will not have an opportunity later to address these questions should it so desire.* As Petitioner told the Office in her email of March 8, 2011, by declining the petitions in *MFA* and *Dunbar*

the Court had ***"nailed shut the coffin on Holocaust art restitution"*** and that Petitioner could not reasonably envision any more claimants or their counsel "'tilting at this windmill'" (Emphasis and italics original) (Exhibit 4).

6. *Finally, the Court should not validate by inaction the cynical strategy and conspicuous misconduct by which the MFA—a federal tax-exempt museum—has defended its ownership of the disputed Painting in this proceeding and thereby create a "template" for other U.S. museums to follow* (Petition at 15, 37-40). The result in *MFA* ***makes an absolute mockery*** of the compelling foreign policy ***and related diplomacy*** of both political branches for many years to return Nazi-era artworks to rightful owners.

IV. CONCLUSION

For the foregoing reasons the Court should reconsider and vacate its March 7, 2011 denial of certiorari in this proceeding, invite the Office to make known its views, and grant the petitions for certiorari both in this proceeding and in *Dunbar*.

Respectfully submitted,

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CERTIFICATION UNDER SUPREME COURT RULE 44.2

As Rule 44.2 of the Rules of the Supreme Court requires, I hereby certify that the foregoing Petition for Rehearing on Order of March 7, 2011, Denying Petition for Writ of Certiorari is restricted to the grounds specified in Sup. Ct. R. 44.2, and is presented in good faith and not for delay.

/ s/ Thomas J. Hamilton

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DECLARATION OF COUNSEL OF RECORD FOR PETITIONER THOMAS J. HAMILTON IN SUPPORT OF PETITION OF REHEARING ON ORDER OF MARCH 7, 2011, DENYING PETITION FOR WRIT OF CERTIORARI

Thomas J. Hamilton, counsel of record for petitioner, Claudia Seger-Thomschitz, declares as follows:

1. I am counsel of record in this proceeding for the petitioner, Claudia Seger-Thomschitz (S-T). On January 10, 2011, I filed a Petition for Writ of Certiorari (Petition) asking the Court to review the decision of United States Court of Appeals for the First Circuit in *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010) (*MFA* decision or *MFA*). By order dated March 7, 2011, the Court denied this petition. *Seger-Thomschitz,*

Claudia v. Museum of Fine Arts, Boston, 2011 WL 97629 (March 7, 2011). I submit this Declaration under Supreme Court Rule 44.2 to bring to the attention of the Court "circumstances of a substantial or controlling effect" and "other substantial grounds not previously presented" that recommend that the Court reconsider and vacate its order denying the petition for writ of certiorari in this proceeding, and invite the Office of the Solicitor General of the United States (Office) to make known its views in this case. By order dated October 4, 2010, the Court asked the Office to express its views in the related, pending proceeding *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 09-1254 (April 14, 2010). (*Von Saher* similarly addresses the relationship under the Supremacy Clause of the U.S. Constitution between express and emphatic federal policy favoring the restitution of Holocaust-era artworks and state statutes of limitations that affect judicial remedies to recover these materials.) *See Von Saher v. Norton Simon Museum of Art at Pasadena,* 131 S.Ct. 379 (Oct. 4, 2010) stating that "[t]he Acting Solicitor General is invited to file a brief in this case expressing the views of the United States."

2. As the accompanying letter from the United States Department of State (Department) to me dated March 8, 2011—but postmarked March 14, 2011 (Letter)—relates, the Department intends to submit its views in the *Von Saher* proceeding. (A copy of this letter is appended to this Declaration as Exhibit 1 and a copy of the postmarked envelope is attached as Exhibit 2.) The Letter explains that the Department did not accept the invitation of petitioner to submit an amicus brief in support of her January 10, 2010 Petition because "[t]he

Department generally does not request that the Solicitor General file an amicus brief at the certiorari stage in third party litigation unless the views of the United States are solicited by the Court." The Letter observed, however, that the Department would be submitting its views in the *Von Saher* proceeding, which the Department identified as also "involving Holocaust era art restitution." The Letter said that ***"[t]hese views, when they are submitted, may be of interest to you."*** (Emphasis and italics added.) The Letter also said that ***"I hope that this reply is of some assistance to you."*** The background and circumstances underlying my colloquy with the State Department and Office of the Solicitor General on this matter are as follows:

3. After the United States Court of Appeals on September 20, 2010 denied the motion of Petitioner for a rehearing in this proceeding, I began preparations to file a petition for writ of certiorari with the Court seeking review of this decision as well as the related *Seger-Thomschitz v. Dunbar,* 2011 WL 589025 (Feb. 22, 2011). Toward this objective I wrote an eight-page letter dated October 13, 2010 to Edwin S. Kneedler, Esquire, the Deputy United States Solicitor General. I told Mr. Kneedler that I had directed this correspondence to him because he had argued the position of the United States in *American Insurance Association v. Garamendi,* 539 U.S. 396 (2008), and that *Garamendi* raised similar issues concerning the preemptive effect—under the Federal Supremacy Clause—of Executive Branch foreign policy in the field of Holocaust-era restitution as did *MFA* and *Dunbar.* The Letter made several arguments why Executive Branch foreign policy—which Congress expressly supports—to return Nazi-

confiscated artworks to rightful owners and to decide these claims on their substantive merits preempted state statutes of limitations that foreclose this objective. These included citation to the testimony of Special Ambassador on Holocaust Issues Stuart Eizenstat before the United States Commission and Security in Europe (CSCE testimony) in Washington D.C. on May 25, 2010 that the legally non-binding Terezin Declaration was ***the only practical way*** that the U.S. could promote its broader and far more emphatic foreign policy of diplomacy seeking to induce affected nations to resolve claims for Holocaust-era artworks on their substantive merits (October 13, 2010 letter at 6). This letter emphasized additional testimony of Ambassador Eizenstat that the Declaration created moral imperatives and obligations which the U.S. Department of State invokes through diplomacy to further its foreign policy to return Holocaust-era artworks to rightful owners.

4. The October 13, 2010 letter related additionally that as in *Garamendi* (539 U.S at 4) relevant state statutes "'threaten to frustrate the particular mechanism that the President has chosen'"—international diplomacy and moral suasion—to achieve his discrete foreign policy goal of returning Nazi-confiscated artworks to rightful owners (October 13, 2010 letter at 7). This letter closed with an invitation to meet with Mr. Kneedler to discuss the matter.

5. On or about November 11, 2010 I sent a second letter to Mr. Kneedler along with a comprehensive memorandum of nearly 56 pages addressing this subject and inviting the Office to submit an amicus brief in support of the Petitioner's prospec-

tive petitions for a writ of certiorari both in *MFA* and *Dunbar* (Memorandum). On or about this same date I sent the same materials along with accompanying correspondence to the office of the Legal Adviser of the Department of State (Harold Hongju Koh) also requesting that the Department submit an amicus brief in support of the prospective Petition.

6. The Memorandum treated extensively the history of the activities of both Congress and the Executive Branch seeking to return Nazi-era artworks internationally to rightful owners, and the foreign policy initiatives of both political branches to ensure that all affected nations resolve these claims on their substantive merits and without regard to otherwise potential statutes of limitations. The Memorandum cited the official explanatory letter of James A. Leach, Chairman of the House Committee on Banking & Financial Services, and Benjamin A. Gilman, Chairman of the House Committee on International Relations, to their colleagues urging support for the 1998 Holocaust Victims Redress Act, Public Law No. 105-158, 112 Stat. 15 (1998). This letter declared that "'[o]ur bill underscores the fact that the ***restitution*** of these works of art to their rightful owners is required by international law and expresses the sense of Congress that governments should take appropriate action to achieve this objective'." (Emphasis and italics supplied.) Memorandum at 11. The Memorandum also cited President Clinton's Statement on Signing the Holocaust Victims Redress Act, February 13, 1998, 34 Weekly Comp. Pres. Doc. 263 (Feb. 20, 1998) stating that "[w]e have pressed for the ***restitution*** of property and for the full declassification of archives so that confiscated assets can be traced and restored to their rightful owners... [I]t is my hope that... this

bill... will hasten the ***restitution*** that they undeniably deserve." (Emphasis and italics supplied.)

7. The Memorandum additionally stressed the consistent testimony of Ambassador Eizenstat to Congressional Committees both in 2006 and 2010 that even though the Washington Principles of 1998 and the Terezin Declaration of 2009 were legally non-binding, both agreements promoted ***the broader and more emphatic U.S. foreign policy*** to persuade other nations through diplomacy to decide claims for the recovery of Nazi-era artworks on their substantive merits and to return these artworks to rightful owners. (Emphasis and italics added.) Memorandum at 13, 17, 41. As Ambassador Eizenstat testified before the Helsinki Commission in Washington D.C. on May 25, 2010: "[i]f we tried, again, to make them legally binding, we wouldn't get to first base." Memorandum at 41.

8. The Memorandum also pointed out that the website of the State Department relates that it seeks to promote its policy for the return of Nazi-era artworks and other property in the context of its broader foreign policy objectives with affected nations:

> The Office of Special Envoy for Holocaust Issues, Douglas Davidson, develops and implements U.S. policy with respect to the return of Holocaust-era assets to rightful owners... **The Office does this in a manner that complements and supports broader U.S. interests and initiatives in a Europe committed to democracy, pluralism, human rights, and tolerance...** (Emphasis and italics added.)

Memorandum at 26. *See* the official website of the United States Department of State on Holocaust Issues (www.state.gov/p/eur/rt/hlcst).

9. The Memorandum further underscored testimony from Ambassador Eizenstat before the Helsinki Commission on May 25, 2010 that while the Department encourages the development of a commission to resolve claims for the recovery of Nazi-era artworks of lesser value, the Department always has assumed **that U.S. courts would decide claims for the return of artworks of higher value:** "[s]uch a forum would be particularly well-suited to deal with claims for works of lesser value. This is because most experts believe that claims for high value artworks will inevitably go to the court system, since the value of the artwork would justify the expense of judicial proceedings, whereas lesser value artworks would not." Memorandum at 31 citing CSCE prepared remarks at 16. (*The Prague Conference on Holocaust Era Assets: An Overview*, Testimony by Ambassador Stuart E. Eizenstat Special Advisor to the Secretary of State for Holocaust Issues Before the Commission On Security and Cooperation in Europe, May 25, 2010, Statement for the Record at 16, App. at A-36. (Available at http://CSCE.gov/index.CFM).

10. On December 30, 2010 I received an email from Mr. Kneedler at the Office relating he had reviewed the extensive materials that I had sent him—(***exceeding 60 pages***)—and requesting that I forward him a copy of my petition for writ of certiorari in *Dunbar* if I had prepared one. (A copy of this email is attached as Exhibit 3). Mr. Kneedler stated as follows:

> Thank you for the materials you sent, which I did review. Have you filed a certiorari petition? If so, could you please email it to me?

11. I responded immediately by emailing Mr. Kneedler a copy of the certiorari petition in *Dunbar*. As promised, I also later emailed him a copy of the certiorari petition in *MFA* once I had completed it.

12. I heard nothing back from either the Office or Department and, on January 10, 2011, I filed the Petition in this proceeding. On March 7, the Court entered an order denying the Petition. *Seger-Thomschitz, Claudia v. Museum of Fine Arts, Boston*, 2011 WL 97629 (March 7, 2011). On March 8, I sent Mr. Kneedler and his colleague Michael Dreeben at the Office an email relating that the Court had denied the petitions for certiorari in both *Dunbar* and *MFA*, and that I perceived that in so doing the Court had "***nailed shut the coffin on Holocaust art restitution***" everywhere in the U.S. with the possible exceptions of New York and California. (A copy of this email is attached as Exhibit 4.) (Emphasis and italics original.) The email stated that because state statutes of limitations and related accrual principles foreclose claims for the recovery of artworks lost during the Holocaust (as Ambassadors Eizenstat and Kennedy repeatedly have punctuated), I could not "reasonably envision any more claimants—or their counsel—'tilting at this windmill' any further."

13. In the March 8, 2011 email, I also asked the Office whether it intended to make its views known in the related *Von Saher* proceeding—as the Court had invited—and closed by stating that "I would

appreciate any reaction or suggestion that you might offer."

14. On March 15, 2011, I received a letter dated March 8, 2011 from Attorney-Adviser Brian Israel at the United States Department of State. (Exhibit 1). The letter expressed regret at the Department's delay in responding to my request that it file an amicus brief in support of the petitions for certiorari in *Dunbar* and *MFA*. The letter explained that in declining to file an amicus brief in support of the petitions, the Department had considered the Memorandum, but was following a standard policy of not filing an amicus brief in third party certiorari petition proceedings unless the Court so requests. The letter related:

> We considered your memorandum, but in line with our long standing practice, did not recommend filing an amicus brief because the United States Government had not been involved in the case and our views were not requested by the Court. The Department generally does not request that the Solicitor General file an amicus brief at the certiorari stage in third party litigation unless the views of the United States are solicited by the Court.

15. The letter said further that the Office would be making its views known in the related *Von Saher* proceeding and that ***"[t]hese views, when they are submitted, may be of interest to you."*** (Emphasis and italics added.) The letter closed by relating that "***I hope that this reply is of some assistance to you***." (Emphasis and italics added.)

I swear under penalty of perjury that the foregoing account is true and correct to the best of my recollection.

Dated: March 23, 2011

/s/ Thomas J. Hamilton

Thomas J. Hamilton
Counsel of Record for Petitioner
Claudia Seger-Thomschitz

Exhibit 1
Letter of United States Department of State to Petitioner, Dated March 8, 2011

Seal **United States Department of State**

Washington, D.C. 20520
www.state.gov

March 8, 2011

Mr. Thomas J. Hamilton
Byrne Goldenberg & Hamilton, PLLC
1025 Connecticut Ave., NW, Suite 1012
Washington, DC 20036

Dear Mr. Hamilton:

I am writing in reference to your letter to the Legal Adviser requesting that the Department of State submit an amicus brief supporting petitions for certiorari in *Dunbar v. Seger-Thomschitz* and *Museum of Fine Arts, Boston v. Seger-Thomschitz*. I extend our regrets for the delay in responding.

We considered your memorandum, but in line with our longstanding practice, did not recommend filing an amicus brief because the United States Government had not been involved in the case and our views were not requested by the Court. The Department generally does not request that the Solicitor General file an amicus brief at the certiorari stage in third party litigation unless the views of the United States are solicited by the Court.

As you may be aware, the United States has been invited by the U.S. Supreme Court to submit its views in *von Saher v. Norton Simon Museum of Art (Pasadena)*, a case on appeal from the 9th Circuit involving Holocaust era art restitution that is also before the Court on a petition for certiorari 09-1254.

These views, when they are submitted, may be of interest to you.

I hope this reply is of some assistance to you.

Sincerely yours,

/s/ Brian Israel

Brian Israel
Attorney-Adviser

Exhibit 2
Postmarked Envelope, Dated March 14, 2011
for State Department Letter (Exhibit 1)

Postmark:

Postmark Indicia
02 1M $ 00.88[0]
0004206382 MAR 14 2011
MAILED FROM ZIP CODE 26520

Sender Address:

Office of the Legal Adviser
Suite 203, South Building
2430 E Street, NW
Washington, DC 20037-2800

Official Business
Penalty for Private Use, $300

Addressee:

Mr. Thomas J. Hamilton
Byrne Goldenberg & Hamilton, PLLC
1025 Connecticut Ave., NW, Ste. 1012
Washington, DC 20036

Exhibit 3
Email of United States Deputy Solicitor General Edwin S. Kneedler to Petitioner, Dated December 30, 2010

From: Kneedler, Edwin S (SMO)
[mailto:Edwin.S.Kneedler@usdoj.gov
Sent: Thursday, December 30, 2010 6:40 PM
To: Tom Hamilton
Subject: Question

Thank you for the materials you sent, which I did review. Have you filed a certiorari petition? If so, could you please e-mail it to me?

Exhibit 4
Petitioner's Email to
Messrs. Kneedler and Dreeben,
Dated March 8, 2011

From: Tom Hamilton [mailto:tj.ham@cox.net]
Sent: Tuesday, March 08, 2011 1:46 PM
To: 'Edwin.S.Kneedler@USDOJ.gov'; 'Michael Dreeben'
Cc: 'John Byrne'; 'Stephen@shmlaw.net'
Subject: End of Holocaust Art Restitution in U.S. Courts

Gentlemen,

I write to let you know that the Supreme Court now has denied our petitions for writs of certiorari in both the *Dunbar* and *MFA* cases that I brought to your attention last Fall.(The Court denied the Dunbar petition on February 22 , 2011, and the MFA petition on March 7, 2011).

Neither court of appeals addressed on the merits my arguments that the Terezin Declaration represented an unequivocal exercise of executive claims settlement authority that alone preempted the conflicting state statutes of limitation. Nor did either court acknowledge our argument that the extensive Congressional legislation supporting Holocaust art restitution necessarily augmented the preemptive effect of the Declaration — at least under the judicial principles that the Court has established for making that determination ("the tri-partite" scheme of Justice Jackson's concurring opinion in *Youngstown Sheet & Tube* which the Court reaffirmed most recently in *Medellin*.)

By declining to review these decisions the Court ***has nailed shut the coffin on Holocaust art restitution*** in U.S. courts with the possible exceptions of New York and California. New York

uniformly applies equitable principles rather than statutes of limitation and a discovery rule to determine whether to entertain any judicial claim seeking to recover stolen art objects (Holocaust-era or otherwise). As you know, whether California can extend its statute of limitations to accommodate Holocaust- era claims against publicly-supported California museums is the subject of a pending cert. petition in *Von Saher*., On October 4, 2010 the Court invited the Office of the Solicitor General (Office) to express its views on this subject, but it does not appear that the Office has responded to this invitation.

In the aftermath of *Dunbar* and *MFA*, it is highly improbable that a judicial remedy to recover a Nazi-era artwork would be viable in any state that employs a conventional statute of limitations and "discovery rule".

As you know, the discovery rule imputes constructive notice to victims of art theft — *as well as to their heirs* — to investigate the circumstances of the theft in order to toll the relevant statute of limitations. As both Ambassadors Eizenstat and Kennedy have proclaimed repeatedly, these principles are unfair to Holocaust victims and violate what would appear to be the unequivocal U.S. foreign policy in this area to entertain these claims on their substantive merits. What Holocaust victim or heir was not on at least constructive notice long ago that the Nazis confiscated artworks from Jewish Holocaust victims? Deciding Holocaust-era claims under these principles is both absurd and outrageous. So I cannot reasonably envision any more claimants — or their counsel — "tilting at this windmill" any further.

While I realize that my chances are highly remote, I intend to file a petition for reconsideration in the *MFA* proceeding and to make it transparently clear to the Court what the practical effect of its denial of certiorari will be for Holocaust art restitution in U.S. courts. For this purpose I have several questions for the Office:

1) Does the Office intend to make its views known in the *Von-Saher* case? I want to suggest to the Court that in light of its at least tentative interest in *Von-Saher*, that it reconsider its denial of certiorari in *MFA*. The constitutional questions concerning foreign affairs preemption raised in *Von-Saher* complement those at issue in *MFA*. If the Office intends to file a brief in *Von-Saher* the Court may be more interested in reconsidering its decision in MFA. The *Von Saher* petition asserts what I perceive to be a somewhat unusual argument that concedes that both branches of the federal government have a clearly and strongly expressed foreign policy to resolve judicial claims for the recovery of Nazi-era artworks on their substantive merits. Indeed this policy is transparently manifest in the Terezin Declaration and in the Holocaust Victims Redress Act. But the petitioners insist that the federal government needs the approval of each of the 50 individual states to accomplish this foreign policy objective. Foreign policy, however, (as you know) is one area where the Court traditionally has found preemption.

2) Does the Office have an opinion on substantive merits of the memoranda that I sent you and the arguments that we made in our cert. petitions in *Dunbar* and *MFA*? I appreciated the December 30, 2010 email of Mr. Kneedler and his statement that he had read the materials and was interested in reviewing our cert. petition.

I would appreciate any reaction or suggestions that you might offer.

I appreciate your attention to this matter. Please let me know if you have any questions.

Sincerely,

Thomas J. Hamilton
Byrne Goldenberg & Hamilton, PLLC
1025 Connecticut Avenue NW, Suite 1012
Washington, D.C. 20036
Ph: (202) 857-9775
Fax: (202) 857-9779

Exhibit 5
Helsinki Commission Hearing
United States Commission on
Security and Cooperation in Europe

The Prague Conference on
Holocaust Era Assets: An Overview

Testimony by
Hon. Stuart Eizenstat, Ambassador,
Special Advisor to the Secretary of State
for Holocaust Issues, Dated May 25, 2010

Chairmen, distinguished Members of the Commission, I would like to begin today by thanking you for holding this important hearing on the results and follow up actions relating to the Prague Conference on Holocaust Era Assets, which took place in June 2009.

This was the fifth Holocaust-related international conference in a series that began with the 1997 London Conference on Nazi-Looted Gold, and has included the 1998 Washington Conference on Holocaust-Era Assets, which dealt with insurance, archival access and looted Art: the Stockholm International Forum on the Holocaust, which dealt with education; and the Vilnius International Forum on Holocaust-Era Looted Cultural Assets. These conferences have helped to keep the need for justice for Holocaust survivors and their families before the eyes of the world. All of us concerned with achieving such justice for the victims of the Holocaust (Shoah), and for other victims of Nazi persecution, are deeply indebted to the Czech government for hosting and providing leadership for this historic Conference.

PRAGUE CONFERENCE ACHIEVEMENTS

The Prague Conference was by far the most ambitious of these conferences. It covered the widest array of issues, some of which, such as the social welfare needs of survivors, many of whom live in abject poverty, and private property compensation or restitution, the previous international conferences had never before considered. It also provided new momentum for other issues, such as art recovery. In addition, the Prague Conference was the first Holocaust-related conference to provide a follow up

mechanism, the European Shoah Legacy Institute, which will ultimately be located in Terezin, also known as Theresianstadt, the site of an infamous Nazi concentration camp.

During the conference, we also managed to build a consensus around a set of non-binding, moral commitments for action. These commitments were embodied in the Terezin Declaration, which all 47 participating states accepted and which as a result now serves as a highly detailed roadmap to resolve outstanding Holocaust issues. The Terezin Declaration's most important commitments cover improved social welfare benefits for survivors, new guidelines and best practices for compensation for real property losses and the return of Nazi-looted art, the preservation of Jewish cemeteries, the return of Judaica and Jewish cultural property, the opening of archives, and new initiatives in Holocaust education and remembrance.

With your permission, I will submit a copy of the Declaration for the record. I will also be happy to discuss all of these commitments here in more detail, if you wish. But for the moment I would like to focus in particular on three of these commitments: improved social welfare benefits for survivors, private property compensation, and art restitution.

SOCIAL WELFARE

Elderly Holocaust victims have certain unique social welfare needs. Many survivors lost their entire families in the Holocaust and thus cannot, like many of our senior citizens, rely on a family network of support in their old age. Many also suffer from more acute physical and mental problems than the

general elderly population as a result of deprivation and persecution during the Holocaust era. Moreover, in many countries, particularly those of Central and Eastern Europe that have experienced economic downturns in the past few years, pension benefits have declined, leaving elderly victims even more exposed. As a result, hundreds of thousands of survivors throughout the world face significant health problems and are in such dire financial circumstances that they cannot live their remaining years in dignity. Calculations by experts suggest that total social welfare needs of survivors will slightly increase for about the next four to five years and then diminish rapidly after that. This means that the humanitarian needs of those who have already suffered so much during their lives are becoming increasingly critical and urgent but also time-limited.

As the Terezin Declaration noted, several states have begun to use a variety of creative mechanisms to provide assistance both to these needy Holocaust (Shoah) survivors and to other victims of Nazi persecution. These mechanisms include special pensions and special funds; the payment of social security benefits to non-residents; and the use of assets from heirless property. Some countries have also proposed adopting other methods of support for Holocaust survivors, such as making any concentration camp survivor eligible to receive a pension as a war veteran. We encourage states to consider these and other such actions in order to find ways to address survivors' needs.

The Federal Republic of Germany provides perhaps the most prominent example of such a creative mechanism. It designated the Conference of Jewish Material Claims Against Germany as the successor organization for unclaimed property in the former East Germany. As a result, proceeds from the Claims Conference successor organization are now the single largest source of funding to address the unmet social welfare needs of Nazi victims worldwide.

In addition, Germany has developed extensive programs of benefits for former concentration camp survivors. Indeed, since the founding of the Federal Republic in 1949, Germany has provided 66 billion Euros in compensation and restitution to Holocaust victims. Austria also extends special benefits to all its former citizens who are Holocaust survivors or who were forced to flee Austria during the Holocaust: it allows them to obtain on favorable terms an old age pension and it extends to them the very generous Austrian nursing home benefits even when the survivor resides outside Austria. At the Prague Conference, we urged countries to consider such mechanisms and to extend any such pension or welfare benefits to their former citizens, even if they reside abroad.

PROPERTY RESTITUTION

I would now like to turn to the issue of property restitution and compensation. My association with this issue goes back to 1994, when then-Assistant Secretary Richard Holbrooke asked me to survey the issue while I was the US Ambassador to the European Union. During the following two years I travelled extensively in Eastern Europe to encourage

the former Iron Curtain countries to return communal property (synagogues, churches, community centers, income producing buildings, and even cemeteries) confiscated during the Holocaust, much of it subsequently retained by the communist successor governments, to the re-emerging Jewish and non-Jewish communities. I discovered that the nature of the restitution laws differed from country to country as did the systems of land holding. Some countries had restitution laws on their books but were implementing them in an uneven manner. A number of other countries were still in the process of drafting such laws.

In other words, some countries were doing a better job of dealing with the issue than others. No country, however, had established a comprehensive, systematic way of advertising a claims process, encouraging claimants to file, accepting and processing claims, adjudicating applications in a non-discriminatory and transparent manner, and making just awards of property or compensation other than the process developed by the Federal Republic of Germany for property located in the former East Germany.

In the intervening decade there has also been some progress on this issue. But implementation remains very uneven. Corruption, processing delays, difficulty in obtaining basic documentation, and inconsistent information about the application process have marred property restitution in too many countries. In some instances, basic legislation is still lacking. No country has been exemplary in this field, and many have been quite the opposite.

Now, at this point, one might reasonably wonder: why would governments want to restitute immovable property or pay compensation for it? Well, to begin, there are clearly moral arguments for returning what was wrongfully taken, even if the taking was not done by governments currently in power. These moral arguments were among the reasons the Czech government and we were able to convene the June 2009 Prague Conference on Holocaust Era Assets in the first place. But there are also very practical reasons why governments should want to restitute or compensate. Central and Eastern Europe contains a huge number, probably in the millions, of clouded or "cloudable" property titles to both private and communal properties. In some of these countries this prevents homebuyers and others from getting title insurance. In most it also makes mortgages more expensive than they should be. Real estate markets in many Central and Eastern European countries will never reach their full potential as engines of growth until Holocaust era confiscations and, of course, Communist era confiscations are addressed and resolved either through restitution or reasonable compensation.

Only governments can undertake to create national programs to receive and process claims from affected parties and to address the moral dimension. Just as importantly, only they can create truly unclouded and "uncloudable" property titles. The claimants, whether survivors of the Holocaust or victims of confiscations by the Communists, occupy a special place of interest too. If they are no longer alive, which is predominantly the case when it comes to Holocaust survivors, their heirs have every right to

expect that they will be included in national claims processes for confiscated real estate.

In addition to the obvious unfairness to individuals and communities, the current flawed system also opens up the possibility of serious title disputes well into the future. Unfortunately the individual countries in question, not to mention the European Union as a whole, have failed to recognize the serious impact that clouded titles can have on long term development plans. Investors are unlikely to put up money for new buildings if there is a possibility of ownership challenges. For reasons I cannot explain, this rather obvious point resonates neither in the countries directly concerned nor with the EU itself.

The list of problem areas in individual countries is too long for me to go into in detail this afternoon. Instead, I would like to focus on several countries where we are awaiting long overdue improvements to the current situation.

Let us begin with Poland, where, for several years governments have been making efforts to enact legislation governing private property restitution. Almost ten years ago, in 2001, the President of Poland vetoed the only law Parliament has so far passed. He did so, however, for the right reasons—because it was discriminatory. Most American citizens with property claims in Poland would not have been eligible to apply. Since then no new law has been enacted.

The Polish government, we understand, has now prepared new legislation, which it intends to submit to Parliament in due course. This new law would

benefit claimants in Poland and abroad, including in the United States, and non-Jews would likely comprise the majority of claimants. Unfortunately, in our view, the proposed legislation still falls short in certain ways. It does not, for instance, include property in Warsaw, home to the largest pre-War Jewish population in Poland, which is admittedly difficult to do given the devastation of that city during the war; we understand, however, that there is a plan for the City of Warsaw to fill this void with a city law that will provide a compensation program funded by the sale of city-owned property.

Unfortunately, the law also sets up a potentially burdensome and costly claims process that would make it extremely difficult for many claimants—especially foreign ones—to apply; and it provides minimal levels of compensation to be paid out over a ten-year period. We hope the Polish Government can improve this draft law. At the same time, while the Polish government has already processed most non-Jewish claims for communal property, it has only processed about 33 percent of claims by the Polish Jewish community. We will therefore continue to urge Poland to speed the adjudication of Jewish communal claims as well.

Another area of potential progress in the near future concerns communal property in Lithuania. We understand the government, with the tacit agreement of the Jewish community, will be submitting a communal property proposal to the Parliament soon. This proposal has been under discussion between the community and the government for several years. We continue to urge Lithuania to enact—and to implement—this law as well.

Finally, I should mention Romania, which has established a fund to pay compensation for property claims. This fund was created in 2005 but has yet to become operational. A fund manager was, however, recently appointed. The next step will be to register the fund on the Romanian stock exchange so that the value of its shares can be established and the shares traded. This, we hope, will enable Romania to implement fully its property restitution program.

There are also some other bright spots on the political horizon, though we still need to work with our European colleagues to make sure they come to pass. It is perhaps worth noting here that earlier this year the Parliamentary Assembly of the Council of Europe endorsed the idea that refugees and internally displaced persons have a right to restitution of housing and land, and that if restitution is not possible, replacement property or compensation should also be included in refugees' property rights. This is very helpful, since most of the countries in question are member states of the Council.

The Terezin Declaration also recognized that sixty five years after the end of World War II that the restoration of real and movable property to its rightful owners remains a work in progress. It therefore urged participating states to implement national programs to address unresolved immovable property issues. It also recommended an intergovernmental effort to develop non-binding guidelines and best practices for restitution and compensation of wrongfully seized immovable property by June 30 of this year. This effort is now reaching its final stages. I have, in fact, just returned from talks in Prague on this very subject, and I am confident that we will meet this deadline.

These guidelines will make a substantial contribution to the resolution of outstanding property restitution issues.

RESTITUTION OF ARTWORKS

Let me now turn to the related issue of Nazi-looted art. The Washington Conference Principles on Nazi-Looted Art, which date back to 1998, have become the primary guideline for dealing with cultural objects that changed hands in Europe during the period from 1933 to 1945. They have resulted in a sea change in the art world. Although the Principles by no means created a perfect system, they did assure that the international art market would become highly sensitive to Holocaust considerations.

As a result, since the adoption of these principles, the major art auction houses have been particularly careful to assure that items they put on the market are free of any Holocaust taint. This has not been without cost to them, but their decision to insist on bringing to the market only objects with unquestioned provenance has given buyers and sellers an assurance of clear title. This policy provides protection in a way that would not have been possible prior to 1998. Problem areas do remain, but the art market is much more transparent than it was previously.

The Terezin Declaration reiterated national commitments to these Principles. It also emphasized two issues that have become particularly important since 1998—the need to develop the provenance of artworks through careful research and scholarship, and the need to resolve disputes based on what available records show about the location and ownership of

artworks during the Holocaust period. The Terezin Declaration urges that archives be open and available for provenance research, and that the results of such research be publicly available. It also urges that courts and other fora that decide art restitution cases base their decisions on the facts of the individual case rather than relying on technical legal grounds such as statutes of limitation and what we lawyers call "laches"—that is, the failure to pursue a claim in a timely manner.

The reason the Declaration did so was this: Much of the evidence to support claims did not become available to claimants until the 1990s, when archives—including our own—first became open to the public. In some cases, because of a lack of provenance research or at least of its public distribution, the evidence is unfortunately still not available. This means that to impose statutes of limitation or to insist that a claimant ought to have initiated pursuit of a claim as soon as the loss was discovered may not always be appropriate. My goal from the beginning has been to enable the restoration of artworks to owners and families who lost that artwork because of the nature of the Nazi regime and the confusion and uncertainty which existed during the war and thereafter. I believe we must continue to focus on that objective in the future as well.

One of many developments since the drafting of the Washington Principles has been the recognition of the role that forced sales played during the Holocaust. A forced sale took place when the authorities urged an art owner to sell or otherwise dispose of artworks, perhaps to get an exit permit, or perhaps to ease the pressure applied by the Gestapo

and other agencies of the Nazi government. Sometimes this involved auctioning a collection, with a portion of the proceeds going to the owner and the balance to the Nazis. These sales were frequently quite complex, so that determining whether the price received for an object fully reflected its market value is not a simple matter. Litigation over forced sales has become a major focal point of art restitution cases in recent years.

The Washington Principles also called for the establishment of commissions or other fora to handle art restitution cases. The United Kingdom, the Federal Republic of Germany, France, Austria and the Netherlands have established such commissions; the United States has not. The German and British commissions, to be sure, are empowered to provide only non-binding recommendations to the parties. The French, Austrian and Dutch commissions, however, render decisions that are enforceable.

When considering such a commission for this country, of course, we should recognize that the situation in Europe is significantly different from that in the United States. With a notable few exceptions, European museums are owned by central, provincial or municipal governments, whereas in the United States the majority of museums are private (though they benefit from tax advantages afforded to cultural institutions operated on a non-profit basis.) As a result, European governments have more direct control over their museums than we do in the United States. In addition, the amount of art displaced between 1933 and 1945 and still in Europe is also considerably larger than the amount of displaced art now in the United States.

Since the Prague Conference, the State Department has held open meetings during which interested parties have had an opportunity to express their opinions about whether a commission would serve a useful purpose in the United States. These meetings produced a wide variety of recommendations on how such a commission should be structured and what its exact role should be. But there was at least basic agreement that a U.S. commission would provide a forum in which claimants could bring a claim without assuming the high costs of legal proceedings. Such a forum would be particularly well-suited to deal with claims for works of lesser value. This is because most experts believe that claims for high value artworks will inevitably go to the court system, since the value of the artwork would justify the expense of a judicial proceeding, whereas lesser value items would not.

We have not yet, however, come up with a model of a commission—what qualifications Commissioners should have, how they would be appointed, where in the federal government structure the commission would fit, what its exact responsibilities would be, how it would be funded. These are questions we are still studying. We would welcome any ideas that members of the Commission or other members of the Congress might have on this matter.

CONCLUSION

Let me now conclude by reiterating that the Prague Conference has far exceeded any of the previous four international conferences in which I participated in several respects:

- The preparation was the most extensive of the four and the most far- reaching in obtaining input from experts and stakeholders alike;

- The Terezin Declaration is the most comprehensive, detailed, and responsive to all the major issues in promoting Holocaust justice;

- The important issue of the welfare needs of survivors became a central focus of the Terezin Declaration, which means that the 47 nations present recognized the necessity of addressing the critical needs of survivors in their final years;

- The conference also created the European Shoah Legacy Institute at Terezin, which will, among other things, provide the first-ever follow-up mechanism;

- The conference additionally assigned the European Shoah Legacy Institute the specific task of developing by June 30 of this year voluntary best practices and guidelines regarding restitution and compensation of wrongfully seized immovable (real) property.

So where do we go from here? Our job in the State Department is to work with the states that participated in the Prague Conference to convert the moral commitments in the Terezin Declaration into concrete actions that will make a difference, sooner rather than later, in the lives of survivors and their families, and in preserving the memory of the Holocaust and imparting its lessons for future generation. We feel the urgency of this task. The survivors are, after all, in their waning years, and we do not have time to waste.

COUNTRY-BY-COUNTRY REAL PROPERTY ASSESSMENT

With your permission, I would like to submit in the next couple of weeks a country-by-country assessment of immovable property restitution for inclusion in the record of my testimony.

Thank you.